STATE OF MICHIGAN

COURT OF APPEALS

DONALD E. TROUT,

Plaintiff-Appellant,

v

GRAND TRUNK WESTERN RAILROAD COMPANY and GRAND TRUNK WESTERN RAILROAD INCORPORATED,

Defendants-Appellees.

UNPUBLISHED
September 25, 2014

No. 312727
Wayne Circuit Court
LC No. 11-001290-NO

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

Plaintiff Donald Trout twisted his ankle when he stepped on a large rock while inspecting railroad car brake shoes. He filed suit under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq*., alleging that the rock rendered his workplace unsafe. Defendant Grand Trunk Western Railroad Company responded that a Federal Railroad Administration (FRA) safety standard addressing track ballast immunizes Grand Trunk from any tort liability under the FELA. In railroad parlance, ballast is the material (usually rocks) used to provide structural support to railroad tracks. According to Grand Trunk, the errant rock was ballast. Grand Trunk sought dismissal of Trout's FELA claim, arguing that the agency's ballast regulation trumps Trout's FELA claim.

I concur in the majority's holding that a factual question precludes summary disposition. The majority reasons that if Trout's injury "occurred on a rock that was not ballast and not part of the railroad support structure," the FRA regulation would not bar his claim. While I agree with this analysis, it does not go far enough. I believe that the FRA ballast regulation simply does not preclude this FELA action. I would hold as a matter of law that whether the rock qualified as debris or ballast, the FELA affords plaintiff a right to seek recovery.[1]

[1] My analysis derives in large measure from *POM Wonderful LLC v The Coca-Cola Co*, 573 US ___; 134 S Ct 2228; 189 L Ed 2d 141 (2014), a case decided by the United States Supreme Court only after the parties filed their briefs on appeal in this matter.

I. THE FELA

"A railroad has a duty to use reasonable care in furnishing its employees with a safe place to work. That duty . . . is given force through the Federal Employers' Liability Act (FELA). . . ." *Atchison, Topeka & Santa Fe R Co v Buell*, 480 US 557, 558; 107 S Ct 1410; 94 L Ed 2d 563 (1987). The FELA is a "broad remedial statute," which, as the Supreme Court has repeatedly emphasized, must be liberally interpreted to accomplish Congress's goals. *Id*. at 562. Despite its breadth and "humanitarian purpose,"[2] the FELA imposes a fault-based system, "allowing plaintiffs to recover only for those work-related injuries that are caused by the employer's negligence." *Hughes v Lake Superior & Ishpeming R Co*, 263 Mich App 417, 423; 688 NW2d 296 (2004). For railroad workers injured in the course of employment, the FELA provides an exclusive remedy. *Campbell v BNSF R Co*, 600 F3d 667, 672 (CA 6, 2010). Given the fundamentally adversarial context of a negligence action, "[a] primary purpose of the [FELA] was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 480 US at 561.

The FELA serves a purpose beyond redressing injury. Unlike workers' compensation systems, damages in FELA cases are not capped or limited, but subject to a jury's judgment.[3] "This statute thus serves to provide an injured worker with an expeditious recovery and also gives a railroad the incentive to maintain vigilance over the safety of its workers and, concomitantly, the conditions in which they must work." *Kulavic v Chicago & Illinois Midland R Co*, 1 F3d 507, 512 (CA 7, 1993). Thus, the FELA advances two congressional objectives: just compensation for injury and strengthened workplace safety.

II. THE FRSA

Congress passed the Federal Railroad Safety Act (FRSA), 49 USC 20101 *et seq*., "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 USC 20101. Manifestly, the FRSA is a railroad safety statute. The act delegates to the Secretary of Transportation the general authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 USC 20103(a).[4]

---

[2] *Urie v Thompson*, 337 US 163, 180; 69 S Ct 1018; 93 L Ed 1282 (1949).

[3]Under Michigan's workers' compensation scheme, "[t]he employer, as a trade-off for the obligation to secure the payment of workers' compensation benefits, is relieved of tort liability under the provision of the workers' compensation act that makes a claim for workers compensation the injured worker's exclusive remedy against the employer." *White v Chrysler Corp*, 421 Mich 192, 199; 364 NW2d 619 (1984).

[4] The FELA was first enacted in 1906, and was reenacted in 1908. See *Tiller v Atlantic Coast Line R Co*, 318 US 54, 61; 63 S Ct 444; 87 L Ed 610 (1943).

"By its terms, the FRSA does not alter pre-existing federal statutes on railroad safety." *Kurns v R Friction Prods Corp*, __ US __ ; 132 S Ct 1261, 1267; 182 L Ed 2d 116 (2012). It does, however, include a preemption provision applicable to state laws:

> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A State may adopt or continue in force a law, regulation or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. . . . [49 USC 20106(a).]

In my view and as discussed in detail within, the scope of FRSA preemption is limited by its plain language to state laws or regulations that "cover" the subject matter. I am unable to discern any language in the FRSA supporting that Congress intended this comprehensive safety statute to displace an injured railroad worker's exclusive remedy under the FELA. To the contrary, FRSA's clearly expressed limitations reveal that Congress lacked any intent to override the FELA's safe workplace requirements.

III. THE BALLAST REGULATION

At issue here is whether a ballast regulation adopted by the Secretary of Transportation pursuant to the FRSA precludes as a matter of law an action brought under the FELA.[5] The pertinent FRA regulation that covers track safety standards provides:

> This part prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation. In general, the requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part. [49 CFR 213.1(a).]

The regulations continue in relation to track structure:

> This subpart prescribes minimum requirements for ballast, crossties, track assembly fittings, and the physical condition of rails. [49 CFR 213.101.]

More specifically governing ballast, the regulations provide:

[5] The Secretary of Transportation delegated its regulatory authority to the FRA. *Union Pacific R Co v California Public Utilities Comm*, 346 F3d 851, 858 n 8 (CA 9, 2003).

> Unless it is otherwise structurally supported, all track shall be supported by material which will—
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track crosslevel, surface, and alinement. [49 CFR 213.103.]

The FRA has not promulgated any regulations addressing railroad employee walkways. Nor does the text of the FRSA mention the FELA or a railroad employer's tort liability for negligent injury to a railroad employee.

IV. PRECLUSION

This Court has never considered whether one federal statute precludes enforcement of another federal statute. A review of a related issue—federal preemption of a state statute—provides a helpful starting point. "Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution . . ., which 'invalidates state laws that "interfere with, or are contrary to," federal law.'" *Ter Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014), quoting *Hillsborough Co, Fl v Automated Med Labs, Inc*, 471 US 707, 712; 105 S Ct 2371; 85 L Ed 2d 714 (1985). "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v United States*, __ US __; 132 S Ct 2492, 2500-2501; 183 L Ed 2d 351 (2012). In addition to being subject to express preemption, state laws may be implicitly preempted by federal law "when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law." *Freightliner Corp v Myrick*, 514 US 280, 287; 115 S Ct 1483; 131 L Ed 2d 385 (1995).

However, "the mere existence of a federal regulatory or enforcement scheme," even a "detailed" one, "does not by itself imply pre-emption of state remedies." *English v Gen Elec Co*, 496 US 72, 87; 110 S Ct 2270; 110 L Ed 2d 65 (1990). A court contemplating that federal agency regulations or standards preempt state laws must proceed cautiously:

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. [*Hillsborough Co*, 471 US at 717.]

Unlike preemption, the preclusion doctrine lacks constitutional roots. Rather, it is a judicially-created rule, dictating that under certain circumstances one federal law displaces

another federal law. The United States Supreme Court highlighted the distinction between preemption and preclusion in a very recently decided case involving the latter, *POM Wonderful LLC*, 134 S Ct at 2236:

> In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action. This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. So the state-federal balance does not frame the inquiry. Because this is a preclusion case, any "presumption against pre-emption," has no force. In addition, the preclusion analysis is not governed by the Court's complex categorization of the types of pre-emption. Although the Court's pre-emption precedent does not govern preclusion analysis in this case, its principles are instructive insofar as they are designed to assess the interaction of laws that bear on the same subject. [Citations omitted.]

POM Wonderful arose from a dispute about the labeling of a juice drink. POM Wonderful LLC markets pomegranate juice products. It sued the Coca-Cola Company under the false-advertising provision of the Lanham Act, 15 USC 1125(a), claiming that Coca-Cola mislabeled one of its juice products as "pomegranate blueberry," when in reality the drink contained only 0.3% pomegranate juice and 0.2% blueberry juice. *Id.* at 2235. Coca-Cola moved for summary disposition under FRCP 12(b)(6), arguing that the Federal Food, Drug, and Cosmetic Act (FDCA), 21 USC 301 *et seq.*, barred POM's claim. Coca-Cola premised its argument on preclusion, contending that Food and Drug Administration (FDA) regulations promulgated pursuant to the FDCA permitted Coca-Cola to label its barely-pomegranate juice in the manner it selected, thereby precluding POM's Lanham Act suit. The Court of Appeals for the Ninth Circuit agreed with Coca-Cola that "the FDCA and its regulations bar pursuit of both the name and labeling aspects of POM's Lanham Act claim," *POM Wonderful LLC v The Coca-Cola* Co, 679 F3d 1170, 1176 (CA 9, 2010), and the United States Supreme Court granted certiorari.

The parties in *POM Wonderful* presented the Supreme Court with alternate methods for deciding whether POM's Lanham Act challenge was precluded by the FDCA's misbranding regulations. Both methods derived from principles of statutory interpretation. The Court described "the two competing maxims" as follows:

> POM argues that this case concerns whether one statute, the FDCA as amended, is an "implied repeal" in part of another statute, *i.e.*, the Lanham Act. POM contends that in such cases courts must give full effect to both statutes unless they are in "irreconcilable conflict," and that this high standard is not satisfied here. Coca-Cola resists this canon and its high standard. Coca-Cola argues that the case concerns whether a more specific law, the FDCA, clarifies or narrows the scope of a more general law, the Lanham Act. The Court's task, it claims, is to "reconcil[e]" the laws and it says the best reconciliation is that the more specific provisions of the FDCA bar certain causes of action authorized in a general manner by the Lanham Act. [*POM Wonderful*, 134 S Ct at 2236-2237 (citations omitted).]

The Supreme Court embraced neither the "implied repeal" route nor the "clarifying and narrowing" pathway. Rather, the Court decided that it need not umpire this dispute, as the statutory texts standing alone resolved the issue. *Id.* at 2237.

The Court began with the words of both statutes, observing that "neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA." *Id*. The Court next observed that the terms of the FDCA do not preclude Lanham actions. It continued: "In consequence, food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims. No textual provision in either statute discloses a purpose to bar unfair competition claims like POM's." *Id.* The Court pointed out that the two statutes have coexisted since the passage of the Lanham Act in 1946, and that during the intervening 70 years, Congress made no effort to address any conflict. That silence, the Supreme Court declared, constitutes "powerful evidence" that Congress did not intend the FDCA to exclusively govern the field of food and beverage labeling. *Id.* (quotation marks and citation omitted). Moreover, "[p]re-emption of some state requirements does not suggest an intent to preclude federal claims." *Id.* at 2238.

Delving even deeper into the text of the two statutes, the Supreme Court observed that "[t]he Lanham Act and the FDCA complement each other in major respects, for each has its own scope and purpose." *Id*. Specifically, "[a]lthough both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety. The two statutes impose different requirements and protections." *Id.* (quotation marks and citations omitted). The interests of the FDCA, the Court noted, would be served by allowing private parties to challenge unfair competition practices: "Allowing Lanham Act suits takes advantage of synergies among multiple methods of regulation. This is quite consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance the protection of competitors and consumers." *Id.* at 2239.

The Court forcefully rejected Coca-Cola's argument that the FDCA's preemption provision signaled Congress's intent to preclude Lanham Act suits. The Court explained: "A significant flaw in this argument is that the pre-emption provision by its plain terms applies only to certain state-law requirements, not federal law. Coca-Cola in effect asks the Court to ignore the words 'State or political subdivision of a State' in the statute." *Id.* (citation omitted). Nor was the Court troubled by the possibility of "some variation in outcome" caused by differing results in Lanham Act cases tried to a jury. *Id.* "Because . . . the FDCA and the Lanham Act are complementary and have separate scopes and purposes, this greater specificity would matter only if the Lanham Act and the FDCA cannot be implemented in full at the same time." *Id*. at 2240.

The Court also took pains to describe and refute an argument made by the federal government which bears special relevance in the FELA/FRSA context. In *POM Wonderful*, the Government as amicus curiae argued for adoption of a partial preclusion rule: "that a Lanham Act claim is precluded 'to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label.'" *Id*. This middle position fared no better than the arguments of the parties. The Court reiterated that the two provisions "complement each other with respect to food and beverage labeling." *Id*. With a final shot across the government's

bow, the Court unanimously[6] held that the FDCA and corresponding FDA regulations governing drink products did not preclude a Lanham Act claim:

> It is necessary to recognize the implications of the United States' argument for preclusion. The Government asks the Court to preclude private parties from availing themselves of a well-established federal remedy because an agency enacted regulations that touch on similar subject matter but do not purport to displace that remedy or even implement the statute that is its source. Even if agency regulations with the force of law that purport to bar other legal remedies may do so, it is a bridge too far to accept an agency's after-the-fact statement to justify that result here. An agency may not reorder federal statutory rights without congressional authorization. [*Id*. at 2241 (citation omitted).]

Thus, *POM Wonderful* mandates that Congressional intent as manifested by statutory text must guide a court's preclusion analysis.

V. FRA REGULATIONS DO NOT PRECLUDE FELA SUITS

A. THE STATUTORY TEXTS

As *POM Wonderful* instructs, I begin with the language of the two statutes. Neither the FELA nor the FRSA forbids or limits FELA claims implicating subjects of federal regulation. The FELA and its history of liberal interpretation long predated Congress's enactment of the FRSA. The absence of any reference to the FELA in the FRSA supports that Congress understood that the two statutes would peacefully coexist, with the FRSA posing no threat to the compensation system created by the FELA.

But the words that Congress used in the FELA are even more important than those it omitted. Like the FDCA, the FRSA expressly preempts only state laws. It stretches credulity that Congress would have silently intended that safety regulations promulgated by a federal agency would undercut the broadly remedial and compensatory purposes of the FELA.

More importantly, the FELA specifically disallows preclusion. Section 55 of the FELA provides in relevant part: "Any contract, rule, *regulation*, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." 45 USC 55 (emphasis added). The ballast regulation falls within the meaning of this provision. This clear language prohibits both the FRA and railroad company defendants from invoking a regulation to extinguish FELA liability. Furthermore, Congress specifically expressed that the FRSA would "supplement[]" rather than displace existing laws. 49 USC 20103(a).

Like the Lanham Act and the FDCA, the FELA and the FRSA "complement each other in major respects." *POM Wonderful*, 134 S Ct at 2231. Both are intended to enhance railroad

[6] Justice Breyer did not participate in the case.

safety. While the FELA governs the railway workplace and deters safety violations through tort damages, the FRSA protects the entire railroad environment, including the general public. Borrowing from *POM Wonderful*, in combination the two statutes act synergistically to augment railroad safety. Focusing more sharply, the ballast requirement of 49 CFR 213.103 ensures that tracks are sufficiently supported structurally. The regulation does not speak to employee walkways. It defies logic to conclude that Congress intended an agency regulation addressing track support would trump the "deeply engrained" notion that a railroad must provide its employees with a reasonably safe place to work. *Bailey v Central Vermont R, Inc*, 319 US 350, 353; 63 S Ct 1062; 87 L Ed 1444 (1943).

B. THE CASE LAW BACKGROUND

POM Wonderful aside, the United States Supreme Court has twice confronted and forcefully rejected arguments suggesting that other federal statutes precluded or limited recovery under the FELA. The first case was decided more than two decades before Congress passed the FRSA. The second postdates FRSA's enactment. Given this well-established judicial track record, if Congress anticipated that agency regulations generated under the FRSA would preclude the FELA's safe workplace requirement, it has had ample opportunity to say so by amending the FRSA's preemption provision.

Sixty-five years ago, the United States Supreme Court considered whether the FELA encompassed a negligence action arising from a railroad worker's occupational disease, silicosis. The plaintiff in *Urie v Thompson*, 337 US 163, 167; 69 S Ct 1018; 93 L Ed 1282 (1949), premised his FELA suit on violations of the Boiler Inspection Act (BIA), 45 USC § 23 *et seq*., which he claimed caused his disease. A jury found in his favor. The Missouri Supreme Court reversed the jury's verdict, holding that the BIA was "aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts." *Urie*, 337 US at 168 (quotation marks and citation omitted). The United States Supreme Court reversed the Missouri Supreme Court, commencing its discussion by dramatically emphasizing the comprehensiveness of the FELA's statutory text:

> The language is as broad as could be framed: "any person suffering injury while he is employed"; and "such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"; "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances," etc. On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.
>
> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court. [*Id*. at 181-182.]

This introduction to the FELA set the stage for the Supreme Court's holding that the BIA, together with the Safety Appliance Act (SAA), 45 USC 1 *et seq*., "supplement[]" the FELA, "having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible." *Urie*, 337 US at 189. Indeed, the Supreme Court found that violation of either act constitutes negligence per se, explaining that these laws "dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Id.* The BIA and SAA pose no obstacle to FELA recovery, the Court reasoned, because:

> In the absence of any specific showing that Congress had in mind such a restrictive and inconsistent object, we are not free to create one by inference, more especially when it is derived from approaching the problem as if the [BIA and SAA] were wholly independent of and separate in design and purpose from the [FELA]. [*Id*. at 190.]

It would be "highly incongruous," the Court emphasized, to construe a statute "expediting employee recovery" under the FELA as "contracting the scope of compensable injuries and to that extent defeating recovery altogether." *Id*.

Rather than precluding recovery, the railroad safety statutes interpreted in *Urie* served to advance a FELA claim. Further, the *Urie* Court's characterization of the BIA and SAA as "supplemental" to the FELA is echoed in Congress's use of precisely the same term in the FRSA, which grants authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 USC 20103(a).

Buell, 480 US 557, afforded the Supreme Court a second opportunity to consider preclusion of the FELA by another federal law. The plaintiff in *Buell* brought an action under the FELA alleging that he suffered an emotional breakdown caused by fellow employees' harassment. His co-employees' conduct, the plaintiff asserted, denied him a safe place to work. *Id*. at 559. The district court held that the Railway Labor Act (RLA), 45 USC 151 *et seq*., which "provides a comprehensive framework for the resolution of labor disputes in the railroad industry," precluded relief under the FELA. *Buell*, 480 US at 560-562. The Supreme Court disagreed. It noted that the RLA, enacted in 1926, "does not mention the FELA or otherwise deal with the subject of tort liability." *Id.* at 562. Next, the Court observed:

> The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. Presumably a host of personal injuries suffered by railroad employees are caused by negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery. [*Id.* at 564 (citations omitted).]

The Court invoked the core purposes of the FELA to conclude that the RLA had no preclusive effect:

> The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. [*Id.* at 565 (citation omitted).]

Finally, the Court rejected the railroad's alternative argument that "a narrow 'emotional injury' exception be carved out of the FELA." *Id.* at 566. Using language directly applicable to the case before us and foreshadowing *POM Wonderful*, the Court also rebuffed this suggestion:

> Even if we were to find some authority allowing us to rewrite the FELA in this manner, we are not persuaded that it would be appropriate to do so. There is no basis for assuming that allowing FELA actions for emotional injury will wreak havoc with the general scheme of RLA arbitration, and absent an intolerable conflict between the two statutes, we are unwilling to read the RLA as repealing any part of the FELA. [*Id.* at 566-567.]

In my view, the preclusion principles articulated in *Urie* and *Buell* compel the conclusion that Congress intended the safety standards incorporated in the FRA to supplement the FELA rather than to override the latter's safe workplace requirements. Like the BIA and the RLA,

> nothing in the language of the FRSA conflicts with or undermines the primary function of [the] FELA. Rather, the purpose of the FRSA, to promote safety in all areas of railroad operations and reduce railroad related accidents, 49 USC 20101, is consistent with the goal of [the] FELA, to promote employee safety and hold railroads liable for injuries caused by their negligence. [*Elston v Union Pacific R Co*, 74 P3d 478, 488 (Colo App, 2003).]

Accordingly, I would hold that regardless of the rock's provenance, the FRA ballast regulation does not preclude plaintiff's FELA claim.

/s/ Elizabeth L. Gleicher